(2)

No. 91-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD A. FENN, JAMAL RADWAN, SAUDI EUROPEAN INVESTMENT CORPORATION N.V., ALEF INVESTMENT CORPORATION N.V., and ALEF BANK, S.A.,

Petitioners,

vs.

ABDULAZIZ A. ALFADDA, ABDULLAH ABBAR, ABDULLA KANOO, ABDULAZIZ KANOO, YUSIF BIN AHMED KANOO (a Partnership Company), and AHMED A. ZAINY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

If foreign investors are defrauded by Americans acting through a New York-domiciled enterprise, may these investors seek relief under the civil RICO statute where:

(1) They were induced to purchase shares in a Netherlands Antilles holding company and told that proceeds from the stock offering would be used to fund a U.S. investment program;

(2) The fraud was accomplished by U.S. citizens acting through federally and New York-licensed banking agencies, who engaged in the substantial and systematic use of the U.S. wires and mails and the transportation of fraudulently obtained money and securities in interstate and foreign commerce; and

(3) The fraud was consummated when the enterprise (a) oversubscribed the stock offering through sales made in the U.S., (b) diverted offering proceeds within the U.S. to purchase a U.S. company for the benefit of some of the enterprise's more favored shareholders, and (c) enlisted the assistance of a U.S. company and its executives to conceal this fraud.

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Plaintiffs-Respondents Abdulaziz A. Alfadda, Abdullah Abbar, Abdulla Kanoo, Abdulaziz Kanoo, Yusif Bin Ahmed Kanoo (a Partnership Company), and Ahmed A. Zainy (hereinafter collectively "the Respondents") submit this brief in opposition to the petition of Defendants-Petitioners Saudi European Investment Corporation N.V. ("SEIC"), Alef Investment Corporation N.V., Alef Bank, S.A., Richard A. Fenn, and Jamal Radwan (hereinafter collectively "the Petitioners") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 5, 1991. That judgment reversed the decision of the United States District Court for the Southern District of New York dismissing the amended complaint for lack of federal subject matter jurisdiction.

STATEMENT OF THE CASE

Through omission and distortion, Petitioners have reshaped the record below and the conclusions of the Second Circuit almost beyond recognition. Petitioners present this case as one involving a "wholly foreign transaction" bearing only a "peripheral" and "incidental" relationship to the United States. They are able to characterize the conduct at issue as "wholly foreign" only by ignoring the substantial, jurisdictionally relevant activity that took place in the United States, or by conclusorily labeling that activity "peripheral." They overcome other facts unfavorable to their theory of the case by misstating those facts. They condemn the Second Circuit for not applying a "conduct or effects" analysis, even though the court plainly applied that very test in sustaining subject matter jurisdiction under both the federal securities laws and RICO.

In fact, this case does not involve the "extraterritorial" application of any statute, since most of the conduct complained of occurred in the United States. Rather, this case presents the question of whether the courts of the United States may exercise jurisdiction over an action brought by the foreign victims of a transnational securities fraud that was engineered and consummated in the United States by United States citizens and their corporate affiliates, including two New York-licensed banks. These banks and the individuals responsible for their management first solicited Respondents to help capitalize their U.S. investment plan, then defrauded Respondents through a pattern of illicit activities carried out in New York and elsewhere in the United States. They prepared a fraudulent stock prospectus here and arranged to have it distributed to foreign investors, allegedly from Paris. They then proceeded to dilute Respondents' shareholdings by selling excessive voting shares in the United States. They diverted the proceeds of the fraudulent stock offering to United States investments for the purpose of benefitting themselves and certain favored investors. Lastly, they conspired with one U.S. investor (Charles Keating) not to divulge the fraud to other investors and engaged in additional, substantial activities in the United States that were designed to cover up their fraud. These acts within the United States were integral, not peripheral, to the Petitioners' consummation of the fraudulent scheme. These acts directly caused the losses suffered by Respondents.

Petitioners contend that in sustaining federal jurisdiction under RICO, the Second Circuit should have but did not apply the "conduct or effects" test to determine whether a U.S. statute may be applied to international transactions. Petitioners misread the decision below. The Second Circuit expressly applied the test Petitioners say it did not, to jurisdictionally determinative facts Petitioners belittle but cannot deny. After doing so, the court properly concluded that federal jurisdiction exists under both the federal securities laws and RICO.

This case neither breaks new ground, extends the jurisdictional reach of RICO, nor conflicts with the decisional law of other circuits or of this Court. Where, as here, American citizens mobilize capital for the express purpose of U.S. investment, bring the investment proceeds to New York and then divert the funds here, those responsible should reasonably expect to be subject to this country's laws and judicial process.

As a matter of fact, law, and policy, the decision of the Second Circuit is correct, and no basis exists for the grant of certiorari.

A. The Parties[1]

Plaintiffs-Respondents Alfadda, Zainy, Abbar, and the Kanoos are residents and citizens of Saudi Arabia and Bahrain. Each owns voting stock in Defendant-Petitioner SEIC.

All of the key participants in the fraudulent scheme are United States citizens. Petitioner Jamal Radwan, the Chairman of SEIC, is a U.S. citizen who spends much of his time in New York. (E-392.)[2] Petitioner Richard Fenn, the former Vice-Chairman of

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[1] On Petitioners' motion to dismiss and the subsequent appeal, the largely undisputed facts alleged in the amended complaint are deemed to be true. Wright and Miller, Federal Practice and Procedure § 1350 at 220 (2d ed. 1990). To the extent, if any, that the court of appeals disagreed with the district court's "factual findings," it was free to take its own view of the facts established through a purely documentary record. *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

[2] References to "A____" and "E____" are to pages of the Joint Appendix and Exhibits, respectively, filed in the Court of Appeals.

SEIC, is a U.S. citizen who resided in New York City during the period at issue and who now resides in Pawling, New York. (E-336.) Radwan and Fenn enlisted two other U.S. citizens to help structure and market the SEIC offering: Mario Diaz-Cruz (a New York lawyer who served as SEIC's general counsel) and Ronald Reilly (the president of Capital International, Inc. ("Capital"), a Texas corporation hired by SEIC to develop and market the offering).[3] Currently, Diaz-Cruz lives in New York and Reilly lives in Connecticut. (A-2 Nos. 23, 24; A-124; A-125.)

During the period relevant to this litigation (*i.e.*, from 1983 to the filing of the original complaint), all corporate Defendants-Petitioners either (a) were licensed federally or by the State of New York as foreign banking organizations, or (b) regularly conducted U.S. business through establishments here. Collectively these corporate defendants refer to themselves as the "Saudi European Group." (E-257; E-360-62.)

The parent company of the Saudi European Group was Petitioner SEIC, a closely-held Netherlands Antilles company. SEIC was formed in 1979 to develop investment opportunities in "western markets" for its shareholders and clients. (E-185.) During the relevant period, SEIC conducted substantial business activities in the U.S. from offices at Rockefeller Plaza in New York City.[4] (E-112-13; E-260-61; E-264; E-282-92; E-316-34.)

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[3] Although Diaz-Cruz and Reilly were not named as defendants in this action, they were sued by Resolution Trust Corporation in a related case in the Southern District of New York involving the same SEIC securities offering, captioned *Resolution Trust Corporation, as Conservator of Lincoln Federal Savings & Loan Association, et al. v. Richard A. Fenn, et al.*, C.A. No. 90-Civ-6050. The Resolution Trust case has been transferred by the Judicial Panel on Multidistrict Litigation for pretrial discovery in connection with other related litigation against SEIC, Fenn and SE Bank in the District of Arizona, captioned *In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*, MDL Dock No. 834.

[4] SEIC's registered office was in Curacao at the headquarters of Pierson Trust (Curacao) N.V. (E-45; E-393.) However, SEIC did business through the U.S. mails and wires at the office of its subsidiaries and affiliates, including the New York City offices of the Saudi European Group and SE Bank. (E-197; E-378-79 at ¶¶ 2, 3.)

SEIC's most significant subsidiary was the Saudi European Bank ("SE Bank"). During the period relevant to this litigation, SE Bank maintained offices in New York City at Rockefeller Center, as well as in Paris and in Bahrain. (E-1-3; E-281; E-283.) The New York State Banking Department licensed the New York office as a "representative" bank in 1981 and upgraded the office to "agency" status in 1985. (E-338; E-254-55.) SEIC and SE Bank were both U.S. dollar-based foreign banking organizations licensed by the Federal Reserve Board. In their 1985 financial report to the Federal Reserve, SEIC and SE Bank reported U.S. banking assets of $166,000,000. (E-285.)

Defendants-Petitioners Radwan and Fenn managed SEIC and its affiliates during the relevant period. Both individuals held positions as "principal officers" of Petitioner Alef Investment Corporation N.V. ("Alef"), an offshore holding and management services company. The management of SEIC was contracted to Alef (E-8-18; E-53), under an agreement providing that all SEIC employees are employees of Alef. SEIC, in turn, owned 15% of Alef. (E-19-20.)

Alef owned Petitioner Alef Bank, S.A. ("Alef Bank") through a Dutch intermediary corporation. (E-19.) In 1983, Alef Bank applied to the New York Banking Department to operate a "representative office" in the same suite as SE Bank. (E-4.) In July of 1984, Alef Bank was issued a license to operate such an office under the direction of Petitioner Fenn. (E-5-6; E-145.) Both Alef and Alef Bank were underwriters of the stock offering at issue (E-44; E-638 at ¶ 9), in which capacity these companies presumably earned the $1 million in discounts and fees disclosed in the Prospectus. (E-49.)

B. The Fraudulent Scheme

1. Preparation Of The Fraudulent Prospectus In The United States

During 1983 and 1984, SEIC's Chairman Radwan and Vice Chairman Fenn devised a scheme to raise substantial capital from investors — ostensibly for legitimate use by SEIC as part of its U.S. investment program — with the ultimate goal of creating

"a public energy company quoted on the U.S. stock exchanges." (E-52.) One of the key steps in this plan was the drafting and preparation of a placement memorandum for distribution to potential investors ("the Prospectus"). (E-44-57.) This document was drafted and prepared in the United States.

To effectuate the U.S. investment program, Petitioners Radwan and Fenn met with Reilly in Atlantic City in September of 1983. (E-22-24; E-357-58.) As a result of these meetings, SEIC retained Reilly's Texas-based company, Capital International, Inc., to prepare the Prospectus and assist SEIC in launching the U.S. investment program. (E-25-30; E-356.) SEIC's contract with Capital provided a bonus for Capital's successful marketing of SEIC's offering in the U.S. and elsewhere. (E-30.)

During October of 1983, SEIC's Texas-based agent, Reilly, drafted portions of the Prospectus in Houston. (E-58; E-363-64; E-885-86.) At the same time, SEIC's general counsel (New York lawyer Diaz-Cruz) worked with Radwan to arrive at the appropriate capitalization formula. (E-32-39.) On November 23, 1983, Reilly telexed Radwan from Houston suggesting that Reilly would "complete production of prospecti in Houston" and review the document with SEIC's general counsel in New York the following week. (E-40.) As planned, Reilly completed production of the Prospectus through the "galley proof" stage in Houston and edited the galley proofs with Diaz-Cruz in New York during the first week of December, 1983. (E-41; E-368-72; E-637 at ¶ 7.) According to Reilly, the Prospectus itself was subsequently printed in Paris as a cost-saving measure. (E-841.) Throughout the latter part of 1983, Diaz-Cruz continued to develop the details of the offering with Radwan and Reilly through a series of telexes and memoranda sent to, from and within the U.S. (E-32-38.)

2. **The Purpose Of The Offering: SEIC's U.S. Investment Program**

The Prospectus clearly sets forth SEIC's investment objectives. These objectives were to be centered in the United States and included:

(1) investment in U.S. financial institutions, one in Texas, the other in Florida (E-48; E-52);

(2) expansion of SEIC's marketable securities in the energy sector, with the ultimate objective being "to assemble, develop and spin-off the acquired assets into a public energy company quoted on the U.S. stock exchanges" (E-48; E-52);

(3) expansion of merchant banking activities, including the opening of an office in New York (E-48); and

(4) expansion of the operations of SE Bank, which already maintained an office in New York managed by Fenn (E-48).

In October of 1983, Diaz-Cruz confirmed in a telephone conversation with Radwan that "[t]he additional capital of SEIC. . .will be used for investments in the United States. . . ." (E-34.)

3. **SEIC's Disclosed Capital Structure**

SEIC was initially capitalized through the 1979 sale of 20,000 shares, marketed at a price of $1,000 per share. Another 20,000 shares of SEIC voting stock was authorized but remained unissued. In 1979, plaintiff Alfadda paid $1 million to acquire 1,000 shares of SEIC voting stock in this initial offering, based partly upon assurances that he would thereafter enjoy a preference to participate proportionately in future SEIC share issuances. (E-420.)

Through the offering described in the 1984 Prospectus, Petitioners sought to increase SEIC's capital by approximately $60 million. This was to be accomplished through a complex capitalization formula designed to leave SEIC with a total capital base of 1.2 million voting shares at the conclusion of a fully subscribed offering. (E-43; E-457.) Based on this capitalization formula, 600,000 voting shares ("Class A Shares") were to be sold in the 1984 offering. The Prospectus reflected this capitalization formula and represented that any oversubscriptions were to be allocated to up to 1,800,000 *non-voting* certificates ("Class AA shares") on a proportionate basis. (E-47; E-57.)

4. **Petitioners' Misrepresentations**

The Prospectus contained several material misrepresentations. First, the Petitioners represented that non-voting certificates would be issued in the event of an oversubscription. This clearly was intended to assure investors that no dilution of their voting shares would occur. The Prospectus also provided that existing shareholders of SEIC, such as Alfadda, would be given the first opportunity to participate in the offering. (E-47.) To the extent voting shares were not bought by the existing shareholders, the Prospectus represented that new investors could acquire the remainder of the 600,000. Finally, the Prospectus specifically represented that investors would enjoy preemptive rights to participate, on a pro rata basis, in any additional offerings or issuances of SEIC stock. (E-57.)[5]

5. **Respondents' Detrimental Reliance Upon The Petitioners' Misrepresentations**

In April of 1984, Respondents Abbar, Zainy and the Kanoos each purchased 10,000 shares of SEIC stock for $1 million, respectively. In making these purchases, Respondents relied upon the representations contained in the Prospectus. Respondents concede they received the Prospectus in the Middle East. Although Respondent Alfadda, as a founding shareholder of SEIC, possessed preemptive rights at the time of the 1984 SEIC offering, he was never given a copy of the Prospectus nor afforded any opportunity to participate in the 1984 offering.

6. **Petitioners' Deposit Of Investment Funds In United States Bank Accounts**

Defendants-Petitioners arranged to have the proceeds from the Offering transferred to New York escrow accounts. On April 9, 1984, the Kanoos authorized the transfer of $1 million to the account of SE Bank's Bahrain branch at Chemical Bank in New York (E-61), which transfer was confirmed by Chemical Bank

[5] The Prospectus contained an additional statement indicating that SEIC's capital base included approximately $20 million of subordinated "capital notes." (E-56.) The Prospectus did not disclose, however, that these "capital notes" could be converted into voting stock, nor that Petitioner Radwan had taken steps to convert the "capital notes" into an additional 600,000 voting shares. (E-383.) This lack of full disclosure constituted a material omission.

telex dated April 13, 1984. (E-725.) Before SEIC closed the Offering, SE Bank transferred the $1 million paid by the Kanoos (together with $10 million in offering proceeds from other investors) to the escrow account that SEIC had established at European American Bank in New York City.[6] (E-72.) This escrow account was similarly the final resting place for the $1 million that Respondents Zainy and Abbar paid, respectively, to receive 10,000 shares of SEIC. (A-140; E-45; E-67; E-71; E-119.)

7. **The Dilution Through Sales In The United States**

Petitioners' version of the relevant facts ends abruptly in April 1984, with each Respondent's remittance of $1 million for the purchase of 10,000 shares of SEIC stock. The scheme to defraud Respondents entailed far more.

By the end of May 1984, SEIC had obtained subscriptions for approximately 345,500 of the 600,000 voting shares described in the Prospectus. (E-132-34.) Although the closing had originally been set for March 31, 1984, it was postponed on several occasions, thereby permitting the further sale of SEIC voting shares in the U.S. market. (E-47; E-67; E-87; E-119; E-123.) Closing did not in fact occur until October 1984. (E-210-216.) During the period April-June of 1984, Fenn and Radwan (together with Reilly) negotiated sales of 330,000 additional voting shares. These sales were made in the U.S. to American Continental Corporation ("ACC") and Mr. Abdulrahman Al-Turki, a Saudi Arabian businessman then working in Houston. Not only did the sales occur in the United States, but substantial activity took place in the U.S. in connection with their negotiation and confirmation.[7] By virtue of these two U.S. sales, SEIC fraudulently diluted the interests of SEIC's investors, including Respondents'.

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[6] Although Petitioners deny that the EAB account was an "escrow" account, Reilly himself referred to it as the "escrow deposit account." (E-71.) His terminology was apt. "Escrow" is defined in *Webster's New Collegiate Dictionary* at 390 (1976 ed.) as "money. . .delivered to a third person to be delivered by him to the grantee only upon the fulfillment of a condition." Here the condition was the delivery of the SEIC bearer shares upon closing.

[7] On April 15, 1984, Fenn met Charles Keating, Chairman of ACC, in New York City and advised Keating of the SEIC offering. (E-66; E-340-46.) Soon

(Footnote continued)

8. The Closing In The United States

The closing of the SEIC Offering (*i.e.*, the exchange of investor funds in escrow for the stock certificates) did not take place until at least October 12, 1984 – the date share certificates were issued to Respondents Abbar, Zainy and Kanoos. (E-210-15.) Some purchasers did not receive their share certificates until later. (E-216-19.)

As part of the closing, SEIC designated a New York bank account as the final resting place for investors' funds. (E-45; E-67; E-71; E-119.) Investor funds collected at SE Bank branches in Bahrain and Paris were transferred to a New York office of European American Bank in anticipation of the New York closing (E-67; E-72-73), which could not occur until all shareholder funds were collected in New York. (E-67; E-119.) At least $45 million in proceeds from the Offering was transferred to accounts maintained for SEIC in New York City. (E-72-73; E-102-04; E-466-68.)

9. Exportation Of Stock Certificates From The United States

At any point up until the Petitioners transferred the stock certificates from the U.S., they could have remedied the fraudulent

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thereafter, Fenn informed Radwan that Keating "would like to take a stake in our [SEIC's] capital offering." (*Id.*) In early May, 1984, ACC sent a letter from Phoenix to Reilly advising him that ACC's savings and loan subsidiary desired to acquire a 15% interest in SEIC. (E-68.) Upon receipt of ACC's letter, Reilly telexed SEIC's auditor to inform him that ACC, "a major (15%) new shareholder of SEIC," required "assistance in setting up an offshore company to hold its investment." (E-69.) Before ACC's offshore shell existed, SEIC telexed ACC in Phoenix to advise that it had accepted ACC's offer to purchase 15% of SEIC (180,000 shares) for $18 million and directed ACC to deposit the money in a New York bank account. (E-71.) In response, on June 1, 1984, Lincoln Savings and Loan Association, an ACC subsidiary, transferred $18 million in "federal funds" to a New York bank account. (E-102-04.)

SEIC also diluted plaintiffs' interests in June of 1984 by selling 150,000 shares of stock to Mr. Al-Turki in Houston. Reilly clearly considered the sale to Al-Turki to be a domestic sale because he telexed Radwan from Houston advising that any sale to Al-Turki should result in Reilly's earning a bonus for a U.S. sale under the bonus provision in the Capital contract. (E-59.) On June 26, 1984, Reilly telexed Al-Turki in Houston accepting Al-Turki's June 22 offer and instructing him to send his funds to Manufacturers Hanover Bank in New York. (E-126; *see also* E-116; E-120; E-124.)

dilution caused by their oversubscription of voting shares. During July and August of 1984, Radwan, Fenn, Diaz-Cruz and Reilly were aware that only voting stock had been sold under the SEIC Offering. Accordingly, they must have known that subscribers' interests were being improperly diluted. (E-142.) In August 1984, Diaz-Cruz drafted the text of the SEIC voting stock certificates, communicated their content to Radwan in Paris, and arranged for the shares to be printed in New York. (E-148-52; E-181; E-199; E-202.) At Radwan's direction (E-199), Diaz-Cruz had 2,000 share certificates (representing well over 1.2 million voting shares) printed in New York. (E-202; E-210-15.) On September 27, 1984, the day before the engraver delivered the printed shares to Diaz-Cruz, Radwan and Fenn met with Charles Keating in Washington, D.C. and explained the "dilution aspects" of the Offering to him. (E-208-09; E-297-98.)

During the first week of October 1984, Radwan and Diaz-Cruz met in New York to assign the shares to subscribers. (E-538.) After making the assignments, share certificates representing almost 2 million voting shares were sent to Europe. (*Id.*) At that time, Radwan, Fenn, Diaz-Cruz and Reilly knew that the Offering was oversubscribed and that the issuance would result in a dilution. (E-120-21; E-142; E-164-68; E-178-80; E-297-303.) Respondents received those documents on or around October 12, 1984. (E-210-11; E-212-13; E-214-15.)

10. The Diversion Of Proceeds In The United States

Plaintiffs-Respondents alleged that proceeds obtained from the SEIC offering were diverted in the U.S. and used to benefit SEIC's management and certain favored shareholders. (A-152-54.) In particular, Respondents challenged the purchase of a U.S. enterprise, Gulf Oil Trading Corp. ("GOTCO"), immediately after the close of the SEIC Offering.

Consistent with SEIC's stated objectives, Reilly searched during August 1984 for a "cornerstone energy investment," which was to become a publicly-traded U.S. energy company. (E-112.) Radwan recommended the Houston-based energy company, GOTCO. (E-146-47.) Over Reilly's objection (E-201), Petitioners apparently arranged for GOTCO to be purchased not for the

benefit of SEIC, but for the benefit of certain favored SEIC shareholders. This is reflected in the Saudi European Group's 1985 Annual Report, where it states that in November of 1984, "some [Saudi European] Group shareholders purchased GOTCO [Gulf Trading Company] from Chevron." (E-261.)

The amended complaint alleges a further diversion of proceeds, consisting of the purchase of convertible preferred stock in Galveston-Houston Company, a Houston company traded on the New York Stock Exchange.[8] (A-154-55.)

11. The Cover-Up In The United States

Having fraudulently diluted Respondents' interests, the Petitioners took steps in the U.S. to suppress the discovery of their fraud. In August 1984, ACC asked SEIC to confirm the existence of only 1.2 million voting shares and to clarify the conversion rights, if any, of the "capital notes." (E-155.) ACC's letter threatened to expose the oversubscription and the fraudulent conversion of SEIC's "capital notes." Reilly quickly forwarded ACC's inquiry to Radwan, Fenn and Diaz-Cruz (E-164), urging Radwan to review the matter promptly with Diaz-Cruz. (E-177.) As a result, Radwan instructed Fenn to arrange a meeting with Charles Keating to answer the charges made in ACC's letter. (E-183.)

On September 27, 1984, Radwan and Fenn met Keating in Washington D.C., and explained that the "legalese" raised by Keating's lawyers was inconsistent with the "family orientation" of SEIC. (E-208.) In Fenn's written account of the meeting, Fenn conceded the "dilution aspects" of the offering and indicated that SEIC was prepared to offer Keating additional shares to offset the dilution of ACC's interests. (*Id.*) Radwan reiterated this offer at a March 1985 meeting with Keating in Florida, during which Radwan offered to sell Keating a block of 80,000 to 130,000 shares to make up for the dilution. (E-224-26.)

In May 1985, ACC's general counsel insisted to Fenn that ACC owned 15%, despite Radwan's statement to Keating that ACC's

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[8] Because the district court barred plaintiffs from conducting discovery on the issue of diversion (A-89), this and additional examples of diversion of the Offering proceeds could not be pursued.

interest "got watered down somewhat to 10%." (E-223; E-304.) The complaints from ACC continued in 1986 (E-304), but were silenced in 1987, when Charles Keating and his group aided Petitioner Radwan in deflecting inquiries from other SEIC shareholders about SEIC's capital structure. (E-313-15.)[9]

C. The Decisions Below

1. The District Court

Plaintiffs-Respondents filed suit in the Southern District of New York, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-68; section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240-10b-5; common law fraud; breach of fiduciary duty; and rescission of contract.[10] After permitting plaintiffs only limited discovery, the court granted defendants' motion to dismiss, holding that it lacked subject matter jurisdiction over the securities fraud and RICO claims. Accordingly, the court dismissed the pendent state claims as well.

Under the traditional tests applied by the district court, subject matter jurisdiction exists with respect to a foreign plaintiff's claim under the securities laws if the plaintiff meets either the "conduct" test or the "effects" test. Here, the district court saw the fraud as having been "committed by placing the allegedly fraudulent prospectus in the plaintiffs' hands." Since "plaintiffs received the prospectus outside the United States," the district court concluded that the fraud had an insufficient nexus with this country to sustain federal jurisdiction. (20a.)[11] Given the

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[9] In *Lincoln Savings and Loan Ass'n v. Wall*, 743 F. Supp. 901, 916 (D.D.C. 1990), Judge Sporkin found that Lincoln Savings and Loan engaged in a transaction with "an affiliate of the Saudi European Bank, an entity in which Lincoln held a 10% interest," which "was spurious from its inception." Judge Sporkin found that Lincoln and the SE Bank affiliate — *i.e.*, SEIC — had engaged in a "parking transaction" to misrepresent Lincoln's financial condition in 1987 and 1988.

[10] Respondent Alfadda did not join in the securities fraud claims, having acquired his interest in SEIC before 1984.

[11] References to "__ a" are to pages of the Appendix to the Petition for a Writ of Certiorari. References to "Pet. at __" are to pages of the Petition itself.

court's opinion that the fraud was complete upon plaintiffs' receipt of the Prospectus, it discounted as "peripheral" and of no jurisdictional relevance the subsequent U.S. activity resulting in the dilution of plaintiffs' stock and diversion of the proceeds, which, in plaintiffs' view, was an integral and culminating part of the continuing fraud.

The district court also dismissed the RICO claim (21a-27a.), holding that the standards for applying RICO to transnational transactions, "at least when RICO is asserted, as here, to recover for what at bottom is a securities fraud — should be consistent" with the standards for applying the securities laws. (23a-24a.) Since the court had already concluded there was no subject matter jurisdiction over the securities fraud claims, it held that RICO jurisdiction was lacking as well. The court reiterated its view that "[t]he principal activity complained of — the communication of fraudulent representations — took place outside of the United States, and the effects of that activity were felt by foreign nationals outside of the United States." (24a.) Characterizing as "subsidiary to the securities fraud" the numerous predicate acts and other U.S. activity relating to the sales to ACC and Al-Turki, the court held:

> [W]hen the RICO predicate acts occurring in the United States consist of subsidiary uses of United States communications and transportation systems, but the underlying fraud occurs outside the United States, the Court lacks subject matter jurisdiction over the RICO claim.

(25a.)

2. **The Court of Appeals**

The Second Circuit reversed, holding that federal jurisdiction exists under both the securities laws and RICO. Although it, like the district court, focused on the "conduct" test and dealt with the same basically undisputed facts, the circuit court differed fundamentally with the trial court's view of the critical elements of the fraud — especially the legal significance of the undisputed events that transpired in the United States after Respondents had received the Prospectus. (7a.)

As noted above, the district court deemed the fraud complete when Respondents received the Prospectus containing the misrepresentations, and dismissed as "peripheral" the subsequent sales of SEIC stock in the U.S. to ACC and Al-Turki. The court of appeals, on the other hand, drew from a long line of its own precedents holding that where conduct is carried out in the United States to *consummate* the alleged fraud, that conduct will be considered relevant for purposes of subject matter jurisdiction. The Second Circuit properly recognized that some of the misrepresentations in the Prospectus did not — indeed could not — become fraudulent until the subsequent U.S. sales actually diluted Respondents' shares: "[T]he prospectuses did not become fraudulent until additional voting shares were sold to Lincoln and Al-Turki." (8a.) The court held that the U.S. activity associated with these sales fully satisfied the traditional "conduct" test. (*Id.*) Thus, the court found subject matter jurisdiction over the Respondents' securities fraud claims.

Turning to the RICO claim, the court acknowledged that, as with the securities laws, RICO is silent concerning its application to transnational conduct. The court did, however, acknowledge this Court's repeated admonition that RICO is to be broadly rather than parochially construed. (10a.) Accordingly, the court held that the mere fact that the corporate defendants (and alleged RICO enterprises) were incorporated abroad did not "immunize them from the reach of RICO." (*Id.*) To determine whether Congress would have intended the court to exercise jurisdiction over Respondents' RICO claims, the court next proceeded (as in any federal case with some foreign elements) to examine whether the conduct being challenged under RICO was sufficient to satisfy the "conduct or effects" test.

Contrary to Petitioners' charge, the court of appeals did not ignore the test of "conduct or effects" in the United States and focus on isolated instances of mail and wire fraud. Rather, the court expressly incorporated by reference its earlier analysis under the securities laws. First, it acknowledged that "[a]mong the predicate acts alleged by plaintiffs are the securities fraud violations consummated by the sales of SEIC shares to Lincoln American Investments and Al-Turki." (10a.) Second, it explicitly

incorporated its prior "conduct or effects" analysis of those predicate acts:

> As discussed *supra*, we disagree with the district court's holding that the alleged fraud was complete upon delivery of the misrepresentations contained in the prospectuses and the subsequent purchases of SEIC stock by plaintiffs Abbar, Zainy and the Kanoos in April 1984. The sales to Lincoln American Investments and Al-Turki were predicate acts which occurred primarily in the United States, and hence, serve as a basis of subject matter jurisdiction for the RICO claims.

(10a-11a.) Thus, on the fully reasoned basis of its prior "conduct or effects" analysis, the Second Circuit found federal jurisdiction over Respondents' RICO claim, reversed the district court's dismissal, and remanded to the trial court for further proceedings.[12]

SUMMARY OF ARGUMENT

1. Petitioners completely misread the Second Circuit's decision when they argue that the court of appeals failed to apply the "conducts or effects" test in determining jurisdiction under RICO. The court conducted just such an analysis earlier in its opinion, when it addressed jurisdiction over Respondents' securities fraud claims and concluded that jurisdiction existed over those claims under the "conduct" test. When it turned to address jurisdiction under RICO, the Second Circuit noted that the earlier discussed securities fraud claims also constitute predicate acts under RICO. It therefore expressly incorporated by reference its earlier analysis and held that the U.S. conduct that was sufficient to support jurisdiction over the securities fraud claims was, for the same reasons, sufficient to support RICO jurisdiction.

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[12] Petitioners seek review in this Court only of the Second Circuit's ruling on RICO jurisdiction, claiming that the "securities claims are time-barred under this Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). . . ." (Pet. at 4 n.3.) Defendants' motion raising that question is currently pending before the district court (as is their motion to dismiss for *forum non conveniens*), and Respondents in no way concede that their securities claims are time-barred.

2. The Second Circuit applied the "conduct or effects" test correctly. The record provides overwhelming evidence of conduct within the United States that effectuated and consummated Petitioners' fraudulent scheme and that directly caused the losses sustained by Respondents. This conduct within the United States is sufficient to sustain jurisdiction over Respondents' RICO claims. Moreover, Respondents' allege specific U.S. conduct by Petitioners that establishes jurisdictionally sufficient predicate acts in addition to securities fraud. These include mail fraud, wire fraud, and the illegal transportation of money and securities in interstate and foreign commerce.

3. The exercise of jurisdiction over Respondents' RICO claims is "reasonable" under the eight factors set forth in the Restatement (Third) of Foreign Relations.

4. The Second Circuit's decision is consistent with the law of all the other circuits and of this Court. U.S. citizens who conduct their activities here and use the instrumentalities of this country to defraud foreign investors cannot reasonably expect to evade the reach of the RICO statute. This is especially so in light of the courts' persistent and emphatic exhortations that RICO must be liberally and broadly construed.

ARGUMENT

THE SECOND CIRCUIT CORRECTLY HELD THAT THE PETITIONERS' CONDUCT WITHIN THE UNITED STATES, WHICH INCLUDED CERTAIN STATUTORY PREDICATE ACTS, WAS SUFFICIENT TO SUSTAIN SUBJECT MATTER JURISDICTION UNDER RICO

A. The Second Circuit Did Apply The "Conduct Or Effects" Test To Determine Subject Matter Jurisdiction Under RICO

Petitioners contend that the Second Circuit "announc[ed] a new rule for the exercise of subject matter jurisdiction" under RICO (Pet. at 8), a rule based entirely on the "peripheral" and "incidental" use of United States mails and wires. (Pet. at 9.) They then compound their foray into fiction by asserting that the court "fell into this error by departing from the test of 'substantial conduct or effects in the United States'. . . ." (Pet. at 3.)

Petitioners are correct that courts have applied some variant of the "conduct or effects" test when examining subject matter jurisdiction under RICO in the context of international fraudulent schemes. *See, e.g., Republic of Philipines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1035 (1989) (conduct and effects test); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (effects test). Petitioners simply defy reality, however, when they suggest that the Second Circuit failed to apply that analysis in the instant case.

Respondents asserted two statutory bases for federal jurisdiction: the federal securities laws and RICO. The court addressed the former first, since the essence of the fraud at issue involves the dilution of a securities offering and the diversion of its proceeds. Acknowledging that the appropriate standard was the "conduct or effects" test, the Second Circuit devoted the bulk of its opinion to applying the "conduct" test to "plaintiffs' largely uncontested allegations" of activities that took place in the United States. (6a-7a.) Concluding that the conduct within the United States was integral to the fraudulent scheme and necessary to consummate the fraud, the court held that under the "conduct" test, the court had jurisdiction over the securities fraud claims.

The court then turned to the RICO claim. It began by observing that "among the predicate acts alleged" by Respondents were the securities fraud violations it had just finished reviewing. It then noted that the district court had dismissed the RICO claim for the same reason it had dismissed the securities fraud claims: its view that the fraud was complete upon receipt of the Prospectus. (10a.) Invoking its prior analysis, the court then said:

> As discussed *supra*, we disagree with the district court's holding. . . .The sales to Lincoln American Investments and Al-Turki were predicate acts which occurred primarily in the United States, and hence, serve as a basis of subject matter jurisdiction for the RICO claims.

(10a-11a.)

The incorporation by reference of its prior analysis could not be clearer. Having already analyzed the Petitioners' activities under the "conduct" test, there was no reason to repeat the exercise. The court reiterated the controlling facts. It then noted its disagreement with the lower court and repeated its reasons for having rejected that court's conclusion, thereby clearly incorporating the "conduct" analysis it had just performed in connection with the securities claims. It need do no more. Contrary to Petitioners' contention, the court clearly reached its conclusion on RICO jurisdiction by means of a "conduct or effects" analysis.

B. The Second Circuit Applied The "Conduct Or Effects" Test Correctly And Properly Concluded That Subject Matter Jurisdiction Exists Under RICO

Not only did the Second Circuit apply the analytical test Petitioners falsely say it ignored; the court applied that test correctly.

The court properly began its analysis by examining the text of the statute. Where, as here, the statute is silent as to its application to international transactions,[13] the next step is to examine Congressional intent. The Second Circuit did so, referring to its previously expressed conclusion that the statute "permits no inference that [it] was intended to have a parochial application." (10a, *quoting United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)). This view is wholly consistent with the pronouncements of this Court, which has repeatedly rejected lower court attempts to erect arbitrary barriers to civil actions under RICO. *See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Finding no statutory impediment to the application of RICO to a case with international aspects, the court turned to an examination of the specific violations alleged here.

RICO catalogues numerous violations that can constitute the requisite predicate acts of "racketeering activity." 18 U.S.C.

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[13] RICO is not entirely silent with respect to its geographical scope. In describing every one of the prohibited activities, Congress referred to activities which "affect[] interstate *or foreign* commerce." 18 U.S.C. § 1962(a), (b), (c) (emphasis supplied). (36a-37a.)

§ 1961(1). (33a-34a.) Continually referring to "mails and wires," Petitioners would have this Court believe that the Second Circuit plucked a few isolated letters, telexes, and telephone calls from the record and relied upon these "attenuated" U.S. contacts to support RICO jurisdiction. Although Petitioners' violations of the mail and wire fraud statutes were indeed sufficient to sustain jurisdiction,[14] these violations were *not* the sole basis of the Second Circuit's decision.

Petitioners' ubiquitous mail and wire fraud offenses were part of a pattern of fraudulent conduct which included various devices. The statute expressly identifies fraud in the sale of securities as a predicate act. 18 U.S.C. § 1961(1)(D). (34a.) The Second Circuit based its "conduct or effects" analysis on Respondents' allegations of those violations, and specifically identified those violations as predicate acts under RICO.[15] (10a-11a.) The Second Circuit's analysis was correct.

1. The Test

The "conduct or effects" test has become the standard yardstick for determining subject matter jurisdiction in international securities fraud cases. Under the "conduct test," a federal court has subject matter jurisdiction if the defendant's conduct in the United States was more than "merely preparatory" to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad. *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). Under the "effects test," a federal court has subject matter jurisdiction where allegedly illegal activity abroad causes a "substantial effect" within the United States. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). If either test is satisfied, subject matter jurisdiction exists. *See*

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[14] Respondents' amended complaint, in a single paragraph, alleges almost 35 different predicate acts of mail and wire fraud. (A-157-59 ¶ 107.)

[15] Satisfied with the substantial U.S. conduct it determined was sufficient to support jurisdiction (mail, wire and securities fraud), the Second Circuit did not belabor the point by cataloguing the additional U.S. conduct alleged by Respondents supporting jurisdiction (*i.e.*, the transportation of persons and money and securities worth more than $5000 in interstate or foreign commerce).

also Tamari v. Bache & Co., S.A.L., 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Securities & Exchange Comm'n v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

2. **The Facts**

Both of the lower courts were dealing with essentially undisputed facts.[16] The record provides overwhelming evidentiary support for the following:

- *1983-to filing of complaint*. The participants in the fraudulent transactions were all United States citizens or businesses that operated in the United States and are thus subject to personal jurisdiction here. (E-1-6; E-22-24; E-150; E-185; E-282-83; E-317-18; E-378-79; E-392; E-394; E-396.)

- *September-December 1983*. The offering prospectus was conceived and drafted through the galley proof stage in the United States. (E-32-37; E-40; E-42; E-58; E-368-72; E-375-77.)

- *January 1984*. The express and stated aim of the offering was to raise funds for investment in the United States. (E-48; E-52.)

- *April 1984*. Before advancing subscription funds to SEIC, plaintiffs Abbar, Zainy and the Kanoos reviewed the Prospectus and relied upon its terms, including the promise that no more than 600,000 shares would be sold. (E-47; E-57; E-425; E-429; E-433.)

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[16] Petitioners list as one of the district court's factual findings the following: "Petitioners' actions in the United States were at most 'subsidiary' to the fraud alleged by respondents." (Pet. at 6.) Petitioners then proceed to state that "[t]he court of appeals did not disturb a single factual finding made by the district court." (Pet. at 8.) Obviously if the first statement is really a finding of fact, the second statement is nonsense, since the Second Circuit's entire decision rested on its conclusion that Petitioners' actions in the United States were substantially more than "subsidiary" to the fraud. In reality, the characterization of Petitioners' U.S. conduct as "subsidiary," "peripheral" or "substantial" is a legal, not a factual conclusion, and formed part of the Second Circuit's analysis.

- *April-June 1984*. Millions in investors' subscription deposits were placed in an "escrow deposit account" at European American Bank in New York prior to the closing. (E-45; E-67; E-71-72; E-102-04.) Other United States bank accounts were used as repositories for investors' deposits. (E-126; E-466-68.)
- *May-June 1984*. Sales of SEIC stock were made within the United States, causing a dilution of plaintiffs' shareholdings. (E-71; E-74; E-102-03; E-123; E-132-34; E-177; E-183-84; E-208-09; E-223; E-225-26; E-297-98; E-304; E-313-15; E-437-68.)
- *October 1984*. The offering closed in the United States. (E-67; E-71-72; E-119; E-120-21; E-126.)
- *October 1984*. The final stock certificates originated in and were exported from the United States, along with other documents containing misrepresentations and omissions which were transported to plaintiffs. (E-120, ¶ 3; E-142; E-148-52; E-198-99; E-202-07; E-210-19.)
- *October-November 1984*. Defendants do not deny, and there is evidence indicating, that substantial amounts of the Offering proceeds were converted in New York and diverted to investments in the United States for the benefit of Radwan, Fenn and a limited group of SEIC shareholders. (E-146 pt. 5; E-201.)
- *September 1984-October 1987*. Attempts were made to cover up the dilution in the United States. (E-142; E-164-66; E-177; E-183-84; E-208-09; E-223-25; E-273; E-297-310; E-313-15.)

Petitioners dispute very little of this. There is no question that Petitioners are United States citizens or were banks licensed to operate in the United States, and there is very little question about the events leading up to Respondents' receipt of the Prospectus.[17]

[17] Petitioners and the district court take the position that the Prospectus, having gone to final print in Paris and having been disseminated in Europe, "cannot be said to have emanated from" the United States. (19a.) Respondents disagree, pointing to the fact that it was drafted, negotiated, and printed through the "galley proof" stage in the United States. The dispute generates more heat than relevance, however, since the venue of the Prospectus' printing has no bearing on the later activity that consummated the fraud and caused Respondents' losses.

Nor is there serious dispute about the activities that took place in the United States between April and June of 1984: no one denies that Reilly and the others negotiated and sold 180,000 shares of SEIC voting stock to Charles Keating's company ACC in Phoenix,[18] and 150,000 shares to Al-Turki in Houston.[19] Nor is there any dispute that the meetings, letters, telexes and telephone calls before and after those sales occurred when and where plaintiffs allege they occurred.[20] The only disagreement is over the legal relevance of those sales.

[18] Although the 180,000 shares were ultimately held in the name of Lincoln American Investment Company N.V., an ACC offshore affiliate formed solely for that purpose, there is no question that ACC, an American company, was the beneficial owner. An internal SE Bank memorandum captioned "*American Continental's Investment in SEIC*" states:

> Today we received a call from ACC to inform us that you will be receiving a confirmation request from ACC's auditors concerning *the investment by ACC in SEIC stock*. The confirmation will be for a company called Phoenician Funding Corp (PFC), NV; this is a name change. The *investment arm* was formerly called Lincoln American Investment Corp.

(E-246) (emphasis supplied). In 1986, ACC obtained actual possession of its SEIC bearer share certificates and held them in the U.S. (E-293-95.) ACC's own records reflect that the SEIC stock was always recorded on the books of ACC as being an asset of an ACC domestic subsidiary. (E-312; E-313-15.) As for the entity Petitioners claim was the real owner of the 180,000 shares, Lincoln American Investment Company N.V. ("LAIC"), the admitted "investment arm" of ACC, all of the managing directors of LAIC were residents of Arizona and officers or employees of ACC. (E-858-59.) Even on Petitioners' own mailing list, the address for LAIC was Phoenix, Arizona. (E-133; E-243.) As the Second Circuit observed, the fact that a Netherlands Antilles "shell company" was created to be the "nominal purchaser does not detract from the import of the United States meetings and negotiations which preceded the sale." (8a-9a.)

[19] Petitioners make the staggering assertion that "the record is uncontradicted that SEIC did not oversell its offering of 600,000 shares. . . ." (Pet. at 9 n.10.) This is simply not true. The combined sales of 330,000 voting shares to ACC and Al-Turki prior to the Offering's closing in October clearly and unequivocally diluted all shareholders' interests. Reilly twice referred to the Offering as "oversubscribed" (E-120; E-124-25), and Fenn and Radwan sought to appease Keating for what they candidly referred to as the "dilution aspect." (E-208; E-224-26.)

[20] In order to demonstrate the alleged paucity of predicate acts supporting the Second Circuit's decision, Petitioners identify one telephone call, four telexes and

(Footnote continued)

Rather than acknowledge this as the determinative point of disagreement, Petitioners ignore the Second Circuit's conclusions and, like a mantra, repeatedly characterize all of the post-April conduct as "peripheral" or "incidental" or "subsidiary." Wishful thinking does not make it so. Petitioners' attempt at rhetorical sleight-of-hand permeates the entire petition and distorts both their rendition of the facts and their argument.[21]

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one letter as the only predicate acts purportedly relied on by the court to sustain jurisdiction. (Pet. at 9 n.11.) In fact, the record reflects many more instances of Petitioners' use of the mails and wires in furtherance of their scheme. *See, e.g.*, A-157 ¶ 107 (over 30 different predicate acts of mail and wire fraud). More significantly, Petitioners misconceive what the court did. In assessing jurisdiction under either the securities laws or RICO, the point of the exercise is not simply to identify and tally every single instance of mail and wire use. Rather, under the "conduct" test, the court must examine *all* conduct within the United States, which includes but is not limited to use of the mails and wire facilities. Such conduct here includes face to face meetings held between Petitioners and Charles Keating in Washington, New York, Arizona and Florida. (E-66; E-74; E-96; E-208; E-224-26; E-297-98; E-340-66.) Such conduct also includes the transportation in interstate and foreign commerce and the deposit of Offering proceeds in U.S. escrow accounts (A-140 ¶ 60; A-153-54 ¶¶ 97-99) and the diversion of those proceeds to purchase U.S. assets such as GOTCO. In short, for the purpose of establishing jurisdiction and a pattern under RICO, it is sufficient that there be at least two uses of the mail or wires in the context of other substantial U.S. activity. That standard is clearly met here.

[21] Petitioners' only direct response to the heart of the Second Circuit's analysis is buried in a footnote, which belittles but does not address the crux of this case:

> The court of appeals sought to bolster its reliance on wire and mail usage in the United States by reference to allegations that petitioners 'completed' the alleged fraud by diluting respondents' SEIC shareholdings through the Al-Turki and Lincoln N.V. sales. (8a.) This is curious, since any fraud upon respondents would have been complete as soon as respondents paid for their shares. . . .

(Pet. at 9 n.10.) Here, as throughout their brief, Petitioners present as unquestioned fact their version of the precise issue on which the courts below differed (*i.e.*, when the fraud was completed and the relevance of the substantial subsequent activity in the U.S.). The court of appeals did not "rely" on "allegations" that the fraud was completed by the dilution. The court analyzed the nature of the fraud alleged, the nature and scope of the conduct conceded, and the substantial body of existing law. Having done so, the court properly rejected what the petitioners propound as unchallenged cosmic law: that the fraud upon respondents was complete "as soon as respondents paid for their shares." *Compare* 6a-9a *with* Pet. at 9 n.10.

3. The Second Circuit's Application Of The Test To The Facts

a. Securities Fraud As The Racketeering Activity

The Second Circuit correctly held that the alleged fraud was not complete upon Respondents' receipt of the Prospectus. Respondents' amended complaint alleged violation of subsections (a), (b) and (c) of Rule 10b-5. (A-162 ¶ 120.) By so pleading, Respondents manifestly defined the fraud to include activities beyond the initial misrepresentations. Respondents' fraud theory is holistic, in the sense that it embraces a continuum extending from the Fall of 1983 (when the Prospectus was conceived and the galley proofs drafted in the U.S.), running through the Fall of 1984 (when bearer shares were finally issued and proceeds diverted for the personal benefit of Petitioners and certain favored shareholders) and extending until at least as late as 1986-87 (when Charles Keating and other ACC representatives conspired with Petitioners to conceal the fraud from Respondents and other shareholders).

Petitioners' fundamental error is in characterizing the alleged fraud as a mere purchase of stock in reliance on misrepresentations, and identifying the point of injury as the date Respondents deposited their subscription funds in escrow. This case is not the typical fraud case under Rule 10b-5(b), where the injury is complete upon the purchase of the stock because the facts represented are false *as of that time*. In this case, when Respondents transferred funds to pay for their SEIC stock, the fraud was still inchoate: Respondents' voting power remained undiluted and the proceeds had not yet been diverted. The acts that *directly caused* their injury — the oversubscribed sales to ACC and Al-Turki and the diversion of the stock proceeds — occurred later, in the United States.

The result reached here under the Second Circuit's exacting standard is consistent with that court's previous decisions.[22] In *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), a Luxembourg

[22] The Second Circuit's interpretation of the "conduct or effects" test has been described as the "most restrictive standard" in the country. *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987).

investment trust and its three Luxembourg liquidators brought suit under the securities laws against a Bahamian venture capital firm. In addition to misrepresentations in and surrounding the agreement, plaintiffs also alleged post-agreement conduct in the U.S. that amounted to the funnelling of Vencap's funds into the hands of one of its officers. The Second Circuit held that the "subsequent acts" of funnelling Vencap's funds for personal benefit were the acts that "consummated the fraud" and, therefore, formed the basis for jurisdiction. Those acts are precisely analogous to the acts alleged here relating both to the dilution of Respondents' SEIC stock and Petitioners' ensuing diversion of funds.

The result below is also correct in light of *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983), a case in which there was far less U.S. activity than that which took place here. In *Psimenos*, the court held that it had jurisdiction over the Greek plaintiff's claims of fraud in the overseas purchases of securities, because Hutton's trades executed on American markets constituted "the culminating acts of the fraudulent scheme . . . ." *Id.* at 1044. Other circuits have also based jurisdiction on conduct that necessarily consummated the fraud. *See, e.g., Tamari*, *Grunenthal*, *Continental Grain*, and *Kasser*, *supra* at 21.

Thus, the Second Circuit's exercise of RICO jurisdiction here was correct: the court identified the alleged securities violations as racketeering activity; it analyzed the securities violations under the "conduct or effects" test and concluded that the "conduct" test had been met, citing substantial activity occurring in the U.S.; it identified numerous predicate acts of mail and wire use as part of the U.S. conduct. This is more than sufficient to sustain RICO jurisdiction over Respondents' claims.

b. Other Racketeering Activity

The predicate acts of securities fraud relied on by the Second Circuit were not the only racketeering activities alleged by Respondents. These other predicate acts also support jurisdiction under RICO.

Respondents have established numerous instances of wire and mail fraud in the U.S. which, when combined with Petitioners' other

illicit acts, constitute a pattern of racketeering activity.[23] Respondents also alleged that Petitioners engaged in a pattern of racketeering activity that included the transportation in interstate or foreign commerce of securities or money converted or taken by fraud, and in the execution and concealment of a scheme to defraud in violation of 18 U.S.C. § 2314. (*See*, *e.g.*, A-156 ¶ 104.) Finally, Respondents alleged Petitioners' furtherance of the scheme to defraud by mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343. (*Id.*)

In *Republic of the Philipines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1035 (1989), the Ninth Circuit upheld RICO jurisdiction where the underlying racketeering activity consisted of mail fraud, wire fraud and the transportation of stolen property. Although virtually all of the alleged underlying fraud took place overseas, the court of appeals sustained jurisdiction under the "conduct" test on the strength of the following U.S. activity: investment in California real estate of $4 million dollars of fraudulently obtained funds; creation of two U.S. bank accounts to hold $800,000 that had been fraudulently obtained; and transportation into Hawaii of money, jewels and other property, worth over $7 million, also fraudulently obtained.

Petitioners argue that the Second Circuit's decision in this case "squarely conflicts with" the *Marcos* decision. (Pet. at 3.) This statement is inexplicable. The conduct and predicate acts established by Respondents here far exceed those held sufficient in *Marcos* and clearly support the exercise of jurisdiction.[24] Indeed, since those acts occurred primarily in the United States, the lower court was not called upon to apply RICO "extraterritorially." There is ample justification for sustaining jurisdiction over Respondents' RICO claims on the basis of any or all of these grounds.

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[23] Mailings and wire communications between the United States and a foreign country in furtherance of a fraudulent scheme are sufficient for jurisdiction over mail and wire fraud violations. *United States v. Goldberg*, 830 F.2d 459, 461-64 (3d Cir. 1987); *United States v. Gilboe*, 684 F.2d 235, 239 (2d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) (wire fraud); *United States v. Steinberg*, 62 F.2d 77, 77-78 (2d Cir. 1932), *cert. denied*, 289 U.S. 729 (1933) (mail fraud).

[24] Even the district court in the instant case, whose decision Petitioners would reinstate and enshrine, believed RICO jurisdiction would exist if measured by the standard applied in *Marcos*. (23a.)

C. Jurisdiction Is Appropriate Under Section 403 Of The Restatement

Section 403 of the Restatement (Third) of Foreign Relations sets out eight factors to be considered in determining whether it is "reasonable" for a U.S. court to exercise subject matter jurisdiction over a transnational dispute. Sections 403(2)(a) and 403(2)(b) correspond most closely to the "conduct" test. As amply established above, the facts in this case satisfy the "conduct" test and, therefore, they also satisfy the first two criteria of Section 403.

The exercise of jurisdiction here is reasonable under the six remaining criteria as well. The citizenship, domicile, and residence of the central figures in this case, the locus of their fraudulent activity, and the acknowledged purpose of their undertakings, support the conclusion that the assertion of subject matter jurisdiction is reasonable under the circumstances presented here.[25]

D. The Second Circuit's Decision Is Neither Revolutionary, Dangerous, Nor Likely To Lead To Disastrous Results

Petitioners issue a shrill call to alarm, suggesting that the Second Circuit has created a revolutionary new rule. They predict that this new rule will throw open the floodgates, forcing U.S. courts to entertain RICO suits arising out of transactions negotiated in a "Turkish bazaar," so long as the transaction is "confirmed by two telephone calls to New York." (Pet. at 16.)

This is nonsense. From the start, Petitioners have attempted to paint this action with a xenophobic brush. First it was "[A]rabs chasing after [A]rabs" (A-87);[26] now it is "Persian rugs in a Turkish bazaar." (Pet. at 16.) Their view of Respondents' fraud action simply

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[25] Professor Andreas Lowenfeld, one of the reporters of the Restatement, submitted a compellingly reasoned and extensive affidavit to the district court. After extensive analysis, Professor Lowenfeld concluded that the exercise of subject matter jurisdiction over Respondents' securities fraud claims is reasonable under the Restatement. (E-469-98.) The same logic and analysis support jurisdiction under RICO as well.

[26] Indeed, one of the Petitioners' counsel jibed:

> We're talking about who's behind which sand dune, got off which camel and said what to whom [–] who then got on some other camel and rode off into the distance. That's what this case is about.

(A-248.)

ignores the overwhelming record evidence of substantial, substantive conduct within the United States by United States citizens, as well as the liberal use of the U.S. mails and wires to effectuate that conduct.

It also bears emphasis that the issue here is subject matter jurisdiction under RICO, an expansively interpreted statute. Both Congress and this Court have directed the lower courts to construe RICO liberally, in order to implement its remedial purposes. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Indeed, RICO has proven uniquely resistent to floodgate threats. Responding to similar arguments that civil RICO was sweeping unintended behavior into its maw, this Court has stated:

> The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of a "pattern."

Id. at 500. In any event, Respondents allege that funds illegally obtained through fraudulent misrepresentations made by U.S. citizens were transported to and invested in banks and businesses in this country. This is precisely the type of conduct RICO was intended to remedy in an era of rampant transnational chicanery.

In determining that jurisdiction exists in this case, the Second Circuit broke no new ground. It measured the allegations of conduct in this country by the yardstick of a standard so well-established it is enshrined in the Restatement. It applied that well-worn standard to a statute which is to be liberally construed to remedy a broad spectrum of offenses affecting interstate or foreign commerce. The undisputed facts betray the overwhelming and legally relevant conduct that took place in the United States. The long-existing law of the Second Circuit and other courts mandates the exercise of jurisdiction in light of those facts.

There is nothing controversial, radical or dangerous about the Second Circuit's decision. Its judgment was correct.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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